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Supreme Court of the United States

No. 73-1312

October Term, 1973

EDWARD BARR and EDWARD ABDULLA,
Petitioners,

vs.

THE STATE OF OHIO,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the Court of Appeals for the Ninth Appellate District of Ohio

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OPINIONS BELOW

The Oral Opinions of the Court of Common Pleas for Summit County, Ohio in the case of *State of Ohio v. Barr* are printed in the Appendix hereto at pages 21, 24. The Opinion of the Court of Appeals for Summit County has been officially reported at 37 Ohio App. 2d 51 (1973), and is printed in the Appendix at page 27. The Order of the Supreme Court of Ohio dismissing the appeal from the Court of Appeals is printed in the Appendix at page 39.

The Findings of the Court of Common Pleas for Summit County, Ohio in the case of *State of Ohio v. Abdulla* are printed in the Appendix hereto at pages 40, 42. The Decision and Journal Entry of the Court of Appeals for Summit County is printed in the Appendix at page 45. The Order of the Supreme Court of Ohio dismissing the appeal from the Court of Appeals is printed in the Appendix at page 58.

JURISDICTION

The Order of the Supreme Court of Ohio dismissing the appeal from the Court of Appeals in the case of *State of Ohio v. Abdulla* was made and entered on November 29, 1973.

The Order of the Supreme Court of Ohio dismissing the appeal from the Court of Appeals in the case of *State of Ohio v. Barr* was made and entered on December 7, 1973.

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(3), 62 Stat. 929 (1948), as amended, 84 Stat. 590 (1970).

QUESTIONS PRESENTED

May a reviewing court hold, as a matter of law, that the trier of fact was in error in finding that there had been an intentional and purposeful discriminatory application of a state penal statute, and rule, as a matter of law, that there had been no intentional and purposeful discriminatory application of such statute, thereby depriving the accused of the benefit of the finding of fact in his favor and foreclosing further evidentiary inquiry on the issue?

Is it constitutionally permissible, under the Fourteenth Amendment, for a state to place the burden on an accused to show beyond any doubt and to the satisfaction of a reviewing court that there has been a purposeful and discriminatory application of a state penal statute before he is entitled to a dismissal of the indictment against him on such ground?

When an accused shows that the Prosecutor has specific evidence that the number of persons who committed the same crimes arising from the same scheme is many times greater than the number indicted, and the Prosecutor and a law enforcement officer admit that there has been no rational basis for selection, has the accused met his burden of making a prima facie showing of intentional and purposeful discrimination sufficient to require the Prosecutor to rebut the evidence adduced?

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The Constitutional provision involved is Amendment XIV, Section 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The statute under which the petitioners were indicted, which they herein contend to have been arbitrarily and discriminatorily applied, is Ohio Revised Code, Section 1707.44 (A), (C):

> 1707.44 Violations.
>
> (A) No person shall engage in the business of acting as broker for others in the purchase or sale of securities, sell securities, cause them to be sold, offer

them for sale, cause them to be offered for sale, or engage in the business of buying, selling, or dealing in securities otherwise than in transactions through or with a licensed dealer, unless the securities are of a kind specified in division (G) or (I) of section 1707.02 of the Revised Code, the transactions are of a kind specified in divisions (B) to (L), inclusive, and (O) to (Q), inclusive, of section 1707.03 of the Revised Code, or in section 1707.04 or 1707.06 of the Revised Code, or the transactions are exempt under section 1707.34 of the Revised Code, without being licensed by the division of securities.

(C) No person shall knowingly and intentionally sell, cause to be sold, offer for sale, or cause to be offered for sale, any security which comes under any of the following descriptions:

(1) Is not exempt under section 1707.02 of the Revised Code, nor the subject matter of one of the transactions exempted in sections 1707.03, 1707.04, and 1707.34 of the Revised Code, has not been registered by description or qualified, and is not the subject matter of a transaction that has been registered by description;

(2) The prescribed fees for registering by description or for qualification have not been paid in respect to such security;

(3) Such person has been notified by the division, or has knowledge of such notice, that the right to buy, sell, or deal in such security has been suspended or revoked, or that the registration by description or by qualification under which it may be sold has been suspended or revoked;

(4) The offer or sale is accompanied by a statement that the security offered or sold has been or is to be in any manner indorsed by the division.

STATEMENT OF THE CASE

The two cases from which the appeal herein was taken both arose from the scheme of one D. Don Lowers, an attorney in Akron, Ohio, for the fraudulent issue of promissory notes. Lowers had engaged over a period of years in the solicitation of money by the issuance of notes while representing himself to be engaged in profitable business ventures by which he could repay indebtedness with an extraordinary return of interest. In the aftermath of the collapse of his pyramid scheme, it was revealed that as many as 1100 to 1500 people had loaned him approximately $11,000,000 over a period of time commencing some time in 1963 and ending in February of 1972.

In January of 1972 a special Grand Jury was convened in Summit County, Ohio to hear evidence of criminality presented to them by the Prosecutor of the County, as to an unknown number of people who may have participated in the unlawful sale of the Lowers notes in violation of Ohio's Blue Sky law.

The Grand Jury returned indictments against fourteen persons, in addition to an indictment against Mr. Lowers himself. All of the persons indicted were charged solely with having sold or offered to sell unregistered securities of Mr. Lowers or having sold such securities without being a licensed broker in violation of Chapter 1707 of the Ohio Revised Code.

At the time the proceedings against the fourteen accused persons other than Lowers began, none of them had

any information as to the scope of the investment scheme perpetrated by Lowers, nor as to the extent of the involvement of others, except that it was clear that approximately 1100 to 1500 people had purchased notes and that a great deal of money remained unpaid. Proceedings had been instituted in the United States Bankruptcy Court sitting in Akron, Ohio, and as a result of hearings therein it became obvious that Mr. Lowers was in fact engaged in no legitimate business and that a great many persons had been unwitting instruments by which others were drawn into the scheme.

Although the hearings were intended to ascertain the activities of the Bankrupt (who never testified) in an effort to show that he was not qualified to proceed in a Chapter XI proceeding under the Act, they were reported as if they were public inquests of wrongdoing by the particular witness summoned and headlines came out daily featuring those who refused to testify in the exercise of their Fifth Amendment rights.

While the investigation in the Bankruptcy Court was thus thoroughly aired in the newspaper, the Ohio Division of Securities, through an investigator, one Thomas Horden, gathered affidavits of various persons as to the sale by others of securities, which he presented to the Summit County Prosecutor and which he and the Prosecutor then presented to the Special Grand Jury for the return of secret indictments, one at a time.

The first case to be tried was that of one Jack Steurer. In his case, defense counsel made a motion to take depositions of various witnesses in order to discover the facts relevant to his defense. The motion was denied by the trial judge. When his case came on for trial some time later, before another judge, a motion was made for a hear-

ing on the claim of the accused that there had been an intentional and discriminatory application of the penal provisions of Chapter 1707 of the Ohio Revised Code. Counsel for the Defendant made specific offers of proof that at least seventy-five persons had in fact caused the sale or transfer of Lowers' notes and that there had been an intentional selection of the fourteen persons as to whom indictments had been returned. The motion for hearing was denied by the trial judge on the ground that to grant it would be to invade the province of the Grand Jury (Appendix page 21).

During trial the Prosecutor called the investigator for the Division of Securities, Mr. Horden, to establish nonregistration of the securities. On cross-examination, counsel for the Defendant was able to elicit the fact that there had in fact been approximately sixty-five persons who had disposed of or assisted Lowers in selling and distributing his notes and that their activity was the same as that of Mr. Steurer:

> Question: Now, what else did that investigation reveal, sir?
>
> Answer: In what area?
>
> Question: Well, it was a very general question. I would like you to answer it completely. Did that investigation reveal anything else to you?
>
> Answer: Yes.
>
> Question: All right. Tell the ladies and gentlemen of the jury what it revealed.
>
> Answer: Well, it revealed that many of the transactions that were entered into and the various dispositions of securities was entered into, was participated by as many as approximately 65 various people.

Question: All right. When you say 65 various people, what did your investigation reveal that these 65 people were doing?

Answer: Well, they were disposing or assisting Mr. Lowers in placing these various securities.

Question: Other people that were doing the same thing that Jack Steurer is charged with doing?

Answer: That is correct.

Question: There were some 65 of them?

Answer: That is correct. (R. 43.)

The point was being pursued when the Prosecutor objected to any further examination. The trial court sustained the objection on the ground that it didn't make any difference how many people were guilty of the same crime as the accused.

Jack Steurer was found guilty of the charge. He was sentenced that day to serve ten to fifty years in the Ohio penitentiary commencing immediately. The trial judge then informed lawyers for all of the other thirteen persons indicted that unless they were prepared to come in and make a plea of guilty to the charges, that everyone who was found guilty of the same charge in trials held thereafter would be sent to the penitentiary. All of the defendants were summoned to appear before the court in two days. All of them did so and the trial judge thereupon vacated the sentence imposed on Mr. Steurer and entertained pleas from all of the defendants. After elaborate individual hearings in chambers to receive their pleas, all pled guilty except Mr. Abdulla. The trial judge once again made it clear beforehand that those who did not plead guilty would be sent to the penitentiary if in fact they were found to be so.

Before sentencing the accuseds who had thus pled, the trial judge entertained a motion on behalf of all of them to permit the pleas to be withdrawn and for a dismissal of the indictments. One of the grounds of the motion for dismissal was the charge that there had been an intentional and discriminatory application of the laws. In addition to the evidence that had been previously offered in the trial of Mr. Steurer, testimony was given by the chief of the Ohio Division of Securities. In his testimony, that official made it clear that evidence of criminality had been gathered as to violation of the State Securities Act by several hundred people in connection with the notes of D. Don Lowers. He said that it was possible to classify such persons, but that he did not know how the classification was made that resulted in fourteen persons (in addition to Lowers) being indicted and said that this had been the decision of the Prosecutor and the Grand Jury.[1]

---

1. The issue as to whether the Prosecutor or the Grand Jury made the actual selection was pure guesswork until after sentencing. Then, both Mr. Horden and the Prosecutor freely admitted in a front-page newspaper interview that there were hundreds of persons involved, the Prosecutor going so far as to say "to indict that many people would have meant destroying our community." The indictments were returned consecutively with Abdulla being the last. Clearly, Mr. Horden and the Prosecutor had decided how the fourteen were selected, and then told the Grand Jury not to indict any others. He stated in a newspaper interview "Then we presented all the information to the Grand Jury. We explained the law and the criteria we were using and left the rest up to them."

This was after sentencing of the thirteen by an out-of-county judge. Several weeks later, when a different out-of-county judge found that Abdulla was a victim of discriminatory application of the statute, an editorial appeared. The headline was "An Explanation is Needed from the County's Judges". The text in part was:

> Beacon Journal readers, in letters appearing on this page today, have expressed some serious concerns about the workings of the judicial system in Summit County.
>
> These concerns, coming in the wake of the decision by visiting Common Pleas Judge Gwynn Sanders on the charges

(Continued on following page)

The Prosecutor offered no evidence at any time as to the basis of selection of the persons actually indicted. On his behalf the assistant Prosecutor urged only that the statute in question permitted a discrimination among accuseds and that there had been no firm or fixed guideline actually adopted.

The trial judge agreed with the Prosecutor that the statute permitted a discriminatory application of the laws and refused to return a finding on the question, simply overruling the motion (Appendix, page 24). The thirteen men were then sentenced as felons to one to five years in the Ohio penitentiary but with sentence suspended, and all were placed on probation.

With respect to the fourteenth individual indicted, Edward Abdulla, the proceedings were somewhat different since he had refused to plead guilty to the charge. Before the date set for his trial, the Ohio Supreme Court assigned a new trial judge to hear his case. That new trial judge entertained pre-trial motions, among them a renewed motion to dismiss the indictment on the ground that there had in fact been a discriminatory application of the laws.

Footnote continued—

against Akron Councilman Edward Abdulla, boil down to one paramount question:

> *Why do Summit County's judges so often ask for a visiting judge, or a retired judge, to bail them out whenever there is a controversial case before the bar?*

We think that is an important question. It deserves a serious answer. . . .

> But even in cases like that of Abdulla and the other Lowers defendants, or in that of Yacobucci, it doesn't seem reasonable that there was not a single elected Summit County judge who could hear the cases with impartiality and rule on the issues with equity. Akron Beacon Journal, Monday, March 19, 1973.

On remand, the *Abdulla* case will be tried by a judge from Summit County.

The same evidence that had been presented in the Steurer trial was presented to that judge, and he made a finding of fact that there had been an unconstitutional and discriminatory application of the law. The Prosecutor, as before, had offered no evidence in rebuttal. The Abdulla indictment was dismissed.

Four of the persons who had been found guilty had already filed notices of appeal of their convictions to the Court of Appeals for Summit County, and the Prosecutor then appealed the dismissal of the *Abdulla* case to the same court.

That court affirmed the convictions of the convicted accuseds and overturned the dismissal of the indictment in the *Abdulla* case. In the case involving Edward Barr, the court found specifically:

> The justification for the selection of fourteen out of sixty-five or more probable violators is, according to the plaintiff (appellee), that the fourteen were in the "business" of selling securities, although the section of Revised Code 1707.44 that provides for the crime makes no such distinction. The fourteen violators sold more "Lowers notes" than some other violators. It is probably true that these defendants (appellants) had greater opportunity to participate in selling the promissory notes, but Mr. Horden testified that all sixty-five were engaged in the same acts. There is a statement by the prosecutor that perhaps a hundred or more were, in some measure, engaged in this process.

In the finding made in the *Abdulla* case, the same court said:

> As indicated in the transcript of proceedings, only those persons with ten or more sales were brought to

court. Those with nine sales, or less, apparently escaped the fate of these defendants (appellants).

The last quoted observation of the Court of Appeals is hedged and perhaps for the reason that the assumption was wrong. There was *no evidence* offered by the Prosecutor at any time and not one bit of testimony to the effect that the fourteen violators had sold any more of Lowers's notes than any other of at least sixty-five ("and perhaps a hundred or more") persons as to whom the Prosecutor had actual evidence that they were engaged in the same criminal activity.

All then attempted an appeal to the Ohio Supreme Court. Their appeals were dismissed *sua sponte* on the ground that they did not involve a substantial constitutional question.

The federal constitutional issue in each of these cases is the denial of the equal protection of the laws, in violation of the Fourteenth Amendment of the Constitution of the United States, effected by means of an intentional and purposeful discriminatory application of a penal statute. This federal constitutional issue was raised and preserved at every stage of the proceedings below in each of these cases.

In *State of Ohio v. Barr*, the federal issue was raised in the Common Pleas Court by means of a motion to dismiss the indictment, which motion was overruled by the Court (Appendix, page 21). In the Court of Appeals, the violation of Fourteenth Amendment rights was specifically assigned as reversible error (Appendix, page 27). In the Memorandum in Support of Jurisdiction filed with the Supreme Court of Ohio, petitioner Barr again presented the federal constitutional issue in the form of propositions of law upon which he requested that Court to rule.

In *State of Ohio v. Abdulla*, the same federal issue was raised at the Common Pleas level in the same manner as in the *Barr* case, i.e., by motion to dismiss the indictment (Appendix, page 42). This motion was granted by the trial judge. In the Court of Appeals, the State of Ohio as appellant assigned the finding of a denial of equal protection of the laws as error, and petitioner Abdulla opposed that assignment of error by brief. The Court of Appeals reversed the Common Pleas Court, holding that there had been no constitutionally impermissible invasion of a federally protected right (Appendix, page 45).[2] Petitioner Abdulla, like petitioner Barr, renewed his federal claim in his Memorandum In Support of Jurisdiction filed with the Supreme Court of Ohio. The Supreme Court of Ohio dismissed the appeals of both petitioners, in which the federal issues were again raised, on the ground that they presented no substantial constitutional questions (Appendix, pages 39, 58).

REASONS FOR GRANTING THE WRIT

The constitutional issue involved in these appeals is one of the power of a state judiciary to prevent the assertion of a Fourteenth Amendment right. That Fourteenth Amendment right in this case is unchallengeable, i.e., the right to equal protection of the laws against arbitrary, capricious, or otherwise unjustified selectivity in

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2. The claim was made by the Prosecutor in his brief that equal protection relates only to a federally protected interest, such as free speech, etc. Without evidence to ascertain the basis for what is apparently an arbitrary selection, defendants cannot show whether they fit into a status that is in fact "federally protected". The selection of Abdulla, in particular, may have been because he was a figure of local political prominence, and because his prosecution would serve the interests of the Prosecutor, who was running for office when the indictments were returned, since the local newspaper strongly favored Abdulla's prosecution.

the enforcement thereof. As stated in the famous language of Mr. Justice Matthews in the landmark case of *Yick Wo v. Hopkins*, 118 U.S. 356 (1886):

> Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution. 118 U.S. at 373.

That principle of the law was conceded to be correct by the State of Ohio at the time the appeals were briefed and argued in the state appellate court. It had not been conceded, however, in the trial court. The Prosecutor there contended that there was in fact no such defense, urging that the provisions of Ohio Revised Code Section 1707.23 left such discretion for enforcement in the Division of Securities that the issue was foreclosed. It was for this reason that the trial judge, in the case of those who pled guilty, declined to make any finding of fact and simply overruled the motion asserting that defense on behalf of each. The trial judge for the appellant Abdulla did entertain the motion, however, and made a specific finding of fact in favor of the accused.

The Prosecutor thus offered no factual support for his denial of the contention of the accused until the issue was forced upon him by an adverse finding by the trial judge in the *Abdulla* case. In the Court of Appeals, he then orally urged for the first time that there was in fact a basis for the selection of fourteen out of sixty-five violators, contending that the smaller group were "in the busi-

ness" because they made ten or more sales to non-relatives while suggesting, but not saying, that the others were not.[3]

We submit that the accuseds in these cases, while nominally guaranteed their right of equal protection of the law, have in fact been deprived of the means to obtain it by the State. The contention was made and a remarkable quantity of evidence adduced to support the charge that there had been a discriminatory selection. The admission that there were names of sixty-five persons on a list prepared for the Prosecutor was brought out by accident. If the Prosecutor had not offered Mr. Horden's testimony for quite another point, there would have been no admissions by the State that in fact any more than fourteen persons were engaged in the particular crime, although in fact the State had obtained evidence against others against whom the Grand Jury was told not to return indictments.[4] Nonetheless, the Prosecutor chose to remain silent when the issue was raised in the trial court.

The defendant Abdulla proved the charge that there had been discriminatory enforcement of the laws to the satisfaction of the trier of fact, in this case the trial judge assigned to hear his case. Notwithstanding that proof, which satisfied an experienced trial judge, the reviewing court both overruled and usurped the function of the trier of fact on the basis of unsworn and unrecorded statements of the Prosecutor in argument. It was not content merely

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3. Although the witness Horden attempted to retrieve his testimony that all sixty-five were doing the same thing by agreeing with a leading question by the Prosecutor, the trial judge in the *Abdulla* case, weighing his testimony, found that the selection had in fact been arbitrary and discriminatory.

4. The Grand Jury did not make a return of "no true bill" as to anyone involved with the Lowers notes, and there is no evidence that case numbers for criminal charges were ever assigned by the Prosecutor to anyone except those actually indicted.

with saying that the evidence was not sufficient to permit a finding and to remand the case to the trial court with the direction to grant a new hearing on the issue so that the Prosecutor could adduce further evidence. Instead, although the Prosecutor adduced no evidence, the Court of Appeals decided the case as if he had presented some and as if they themselves were the triers of fact of the proposition—although they heard no witnesses, and received no evidence themselves.

In the case of the defendant Barr, one of those who pled guilty, the case is only slightly different. In his case, despite the evidence adduced, the trial judge found that he had no duty to make a determination as to whether there had been a discriminatory application of the laws. The Court of Appeals sustained his ruling, which in essence means that they agreed that there was no occasion to make a finding of fact on this issue raised by the defendant—notwithstanding a purported acceptance of the constitutional principle that was involved.

The contradiction between the actual finding of fact made by the trial judge in the *Abdulla* case—the only trier of fact considering the point—and the ruling by opinion of the Court of Appeals that the accused had not made out the defense, demonstrates the difficulty that attends an effort to prove that there has been a denial of the equal protection of the laws. The courts have always been cognizant that enforcement of the laws by prosecutors in large measure depends upon the sound exercise of discretion and should be left to them except when the guarantees of the equal protection clause otherwise require. On the other hand, there is no question about the fact that an accused is entitled to be protected against arbitrary or capricious enforcement of the laws and that unless safe-

guarded by the court, as in the case of other rights, it is no right at all.

The appeal herein permits the Court to establish the guideline which will serve to safeguard the constitutional principle in practice as well as in theory. Prosecutors have long been tempted to allow accuseds to fail simply on the ground that the evidence adduced is inadequate, without having to say one syllable to rebut the position taken. This is particularly true in the enforcement of the criminal laws where, unlike in civil litigation, the accused does not have an absolute right to inquire into the facts relevant to the defense to be asserted. This case is an excellent example of foreclosing the defendant from establishing even the basic fact of selectivity of enforcement upon which his contention of arbitrary and discriminatory application of the law is based. The State kept silent and allowed the trial judge simply to overrule the accused at each step of the proceedings.

The recent case of *U. S. v. Falk*, 479 F.2d 616 (7th Cir., En Banc, 1973), is an excellent example of a similar sequence of events. The Prosecutor in that case also rested simply on the inherent difficulties of establishing the defense. Falk was charged with refusing to submit to induction into the Armed Forces and with failure to possess a draft registration card. The defendant filed a pretrial motion to dismiss those counts of the indictment charging him with failure to possess the proper cards on the ground that the prosecution sought the indictment for the improper purpose of chilling the exercise of rights guaranteed by the First Amendment. The trial judge denied Falk's motion without holding an evidentiary hearing. At trial, an offer of proof based on the same contention was similarly rejected.

The Seventh Circuit Court of Appeals vacated the judgment of conviction and remanded the cause, with the caveat that the burden of going forward with proof of nondiscrimination to rebut Falk's prima facie case would then rest on the prosecution:

> The unrebutted evidence before the court, including the admission of the Assistant United States Attorney and the two published statements by the Selective Service officials which contradict the propriety of the action taken in this case, made out at least a *prima facie* case of improper discrimination in enforcing the law. We will therefore remand the case, to a different judge, for a hearing at which time Falk may question the Assistant United States Attorney as to the content of his previous statements to defendant's counsel and present any additional evidence he wishes on the issue of other alleged violators and the government's lack of general enforcement. In accordance with our holding that a *prima facie* case has already been presented, and in agreement with *United States v. Crowthers*, 456 F.2d 1074 (4th Cir., 1972), however, the burden of going forward with proof of nondiscrimination will then rest on the government. 479 F.2d 616, 623-24.

Compare *Whitus v. Georgia*, 385 U.S. 545 (1967), in which it was also held that the proof offered by the petitioners constituted a prima facie case of purposeful discrimination, which shifted the burden of proof to the State.

The ruling of the Court of Appeals for Summit County in this case with respect to the availability of the right to equal protection of the laws is thus completely at odds with the en banc ruling of the Court of Appeals for the Seventh Circuit in *Falk*. The *Falk* court realized that the

question is one to be decided as a question of fact by a trier of fact—and not by a court whose duty is to pass upon only questions of law. Indeed, to make the evidentiary hearing more meaningful in the *Falk* case, the court there placed a burden upon the Prosecution to come forward with evidence once a prima facie case had been made out. In this respect, the *Falk* decision recognizes the equal protection of the laws right as an issue for determination just as in the case of any other factual defense upon which the question of whether a conviction will stand is made to depend.

The trend of the decisions in the federal courts makes it unlikely that a rule giving practical effect to the equal protection defense has not already evolved. See, e.g., *United States v. Crowthers,* 456 F.2d 1074 (4th Cir., 1972); *United States v. Steele,* 461 F.2d 1148 (9th Cir., 1972). The contrary is true in the state courts, and we know of no decisions from the state courts in modern times in which an accused has succeeded with this defense.[5] The question is uniformly treated as a question of law and the decision made on the rationale of *Oyler v. Boles,* 368 U.S. 448 (1962), to the effect that selective enforcement of the laws is constitutionally permissible. See *State v. Haase,* 97 Ohio App. 377 (1953).

The fact that an evidentiary hearing is a matter of right is not even recognized, either by the Court of Appeals in this case or by the Ohio Supreme Court, which

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5. *The Right To Non-Discriminatory Enforcement of State Penal Laws,* 61 COLUMBIA LAW REVIEW 1103 (1961).

Thus, in this case, as in the case of many crimes which are malum prohibitum, enforcement against all or even the majority of known violators becomes politically unacceptable, and rather than force a reform of the law by recognizing that to be the fact, selective and arbitrary enforcement is chosen as the method by which to uphold the over-harsh regulatory scheme of the statute.

dismissed the appeals saying that no substantial question, state or federal, existed. The means are simply not given the Defendant to prove facts even though the evidence exists—as in this case, where the Prosecutor freely permitted an interview by the newspaper as to the basis upon which he made the discriminations in order to justify the result in the eyes of the public. In the trial court, the Prosecutor simply remained silent and in the upper court argued his position as if an evidentiary basis existed for it. The defense is simply not favored as one that should result in the dismissal of an indictment, if proved. Even though equal protection of the laws is entitled to the same dignity as the defense of failure of due process, it is not so treated in the state courts. It cannot be doubted that the right of an accused to an actual trial on the question of guilt or innocence would be recognized by any court, but that same right as to the discriminatory application of the laws is not so treated.

Respectfully submitted,

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APPENDIX

OPINIONS OF COMMON PLEAS COURT IN BARR CASE

No. 72-5-469

COURT OF COMMON PLEAS
THE STATE OF OHIO, SUMMIT COUNTY, SS.

THE STATE OF OHIO

vs.

EDWARD F. BARR

ORAL OPINION OF COURT OF COMMON PLEAS [No. 1]

Judge Stahl: I think it might be well for me to say a few things. First, there is a difference in the federal law and Ohio law on Grand Juries.

Under the Federal Law the District Attorney conducts the hearing. He shows what evidence there is and all of these things and in Ohio that is different.

In Ohio the Grand Jury is instructed that they are to investigate any and all crimes. They are not to fail to indict for fear or favor.

They are told that the Prosecutor has not any more rights than they have and they can go on and investigate, summons witnesses and do everything they want which is different in the Federal Court.

Now you are confused in the Chinese Laundry cases. This was a Grand Jury. Had all of these things been

started by some affidavits filed against someone then you —and only against some and not others then you might talk about unequal protection of the law.

Here a Grand Jury indicted whom they wanted to and they didn't. They could have believed or not believed anything that they heard.

There is no use having evidence because you can't change the fact that these indictments were all brought because of the action of the Grand Jury itself.

I think when you look back at the Chinese Laundry cases you will find that there they—the city itself—went out and arrested who they wanted to and who they didn't. It happened they didn't arrest any white people. They only arrested the Chinamen and that was what was wrong.

Before that they used to have these laundry cases where the law prohibited a Chinaman from doing it so they passed the Ordinance which didn't prohibit all people doing the same thing and they didn't arrest any Chinamen.

Now, I am telling you that if anybody wants to protect the constitutional rights of anybody it is me but when you begin to tamper with what the Grand Jury does either by the prosecutor or defense counsel saying that the Grand Juries themselves haven't given equal protection to the law—when you impugn the Grand Jury of Summit County, you are impugning something that can't be because I have had too many prosecutors pulling their hair because they say, "The goddamn Grand Jury wouldn't indict them." I have seen it too often for that. They only indict who they want to and you can't say that is an unequal protection of the law because they have heard the evidence and at this point they don't think there is probable cause.

Now if you could show where somebody filed ten affidavits and that is all they filed when they knew there were one hundred violations then I would go along with you but your motion is overruled and there is no use having evidence because you can't impugn what the Grand Jury did in any way.

Mr. Powell: The Prosecutor and the Security Department of this State have certain obligations with respect to alleged security violations and obviously if only the names of fourteen people were presented to the Grand Jury—

The Court: You don't know that and you can't prove that and that is impossible because the Grand Jury can't even tell you.

Mr. Powell: The prosecutor can, Your Honor.

The Court: No, he can't.

Mr. Powell: Your Honor, I don't want to belabor the point. I perhaps chose the wrong word when I said I would put evidence on if you desire. I would like the record to reflect we are moving to put evidence on.

The Court: Your motion is overruled and your motion as to unequal protection of the law because only certain people were indicted, I have to overrule that.

ORAL OPINION OF COURT OF COMMON PLEAS [No. 2]

February 8, 1973

The Court: We are here first for a ruling on the Motion of four of the Defendants that all indictments herein be dismissed, and I understand now that all of the Defendants are—that is, all of the Defendants that have pled are joining in this motion.

* * *

The Court: Well, first I want to dispose of your first motion. If I would grant that, then there would be nothing more to hear, either anything from Mr. Shaul or anybody else.

Mr. Powell: That is correct, Your Honor.

The Court: However, coming to that motion, while it is very, very interesting and does present a question, yet, under this particular act the Department of Securities has different ways that they can proceed so really they have not singled out anyone that they have not proceeded against. They have used different methods. Whether that was the proper way to do it or not, I don't know, but they did and, therefore, I will overrule your motion, branch one. Now, we will proceed with branch two. (R. 185-187).

JOURNAL ENTRY OF COMMON PLEAS COURT IN BARR CASE

No. 72-5-469

COURT OF COMMON PLEAS
THE STATE OF OHIO, SUMMIT COUNTY, SS.

THE STATE OF OHIO

vs.

EDWARD F. BARR

JOURNAL ENTRY

THIS DAY, to-wit: The 8th day of February, A.D., 1973, came the Prosecuting Attorney, STEPHAN M. GABALAC, on behalf of the State of Ohio, the Defendant, EDWARD F. BARR, being in Court and accompanied by counsel, Charles F. Scanlon, Donald A. Powell, for a hearing on the pre-sentence investigation report heretofore ordered on September 28, 1972, at which time the Defendant plead GUILTY to the charges of SALE OF SECURITY WITHOUT A LICENSE, as contained in Three (3) Counts of the indictment, and SALE OF UNREGISTERED SECURITY, as contained in Three (3) Counts of the indictment, which plea was accepted by the Court.

AND THIS DAY, to-wit: The 8th day of February, A.D., 1973, the Court ordered that the first and second branch of the motion of the Defendant filed herein be OVERRULED. The Court further ordered that Counts Number 2, 4, and 6 of the indictment, to-wit: SALE OF UNREGISTERED SECURITY, be NOLLED for the reason

that it would be double jeopardy and the Court would be unable to sentence the Defendant to two charges arising out of the same offense.

THEREUPON, IT IS THE ORDER OF THE COURT that imposition of sentence be and the same hereby is suspended and the Defendant placed on probation for a period of TWO (2) YEARS upon the following terms and conditions, to-wit:

1. That he report to the Adult Probation Department as directed and abide by the rules and regulations of said Department.

2. That he refrain from offensive conduct of every nature and obey all laws.

3. That he pay costs of this prosecution within the next Sixty (60) Days to the Summit County Clerk of Courts, Court House, Akron, Ohio, 44308.

It is the recommendation of this Court that the Defendant be granted clemency by the Governor of the State of Ohio.

SAID PROBATION TO COMMENCE THIS 8th DAY OF FEBRUARY, A.D., 1973.

OPINION OF COURT OF APPEALS IN BARR CASE

(Decided August 1, 1973)

Nos. 7166, 7167, 7168 and 7169

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT OF OHIO
SUMMIT COUNTY

THE STATE OF OHIO, APPELLEE, *v.* STEURER, APPELLANT.
THE STATE OF OHIO, APPELLEE, *v.* BARR, APPELLANT.
THE STATE OF OHIO, APPELLEE, *v.* EMERY, APPELLANT.
THE STATE OF OHIO, APPELLEE, *v.* GEORGE, APPELLANT.

[Cite as State v. Steurer (1973), 37 Ohio App. 2d 51.]

Criminal procedure—Prosecution of accused—Not all accuseds prosecuted—No infringement of constitutional rights, when—Section 2, Article I, Constitution—Article XIV, Amendments, U. S. Constitution—Equal protection of the laws—Chapter 1707, Revised Code—Sale of securities—Evidence.

The discretion exercised by law enforcement officials in determining which of several persons to prosecute is not an infringement upon the constitutional rights of those selected so long as there is no unjustifiable standard adopted or arbitrary classification used.

Mr. Stephan M. Gabalac, prosecuting attorney, and *Mr. Harold K. Stubbs*, for appellee.

Mr. John M. Glenn and *Mr. Donald A. Powell*, for appellants.

HUNSICKER, J. These cases arise as appeals of a denial of motions by the trial judge, who was asked, in each case,

to declare void a judgment of guilty, based upon the alleged grounds of the discriminatory enforcement of a criminal statute, and from the judgment rendered, in each case, on the plea of guilty entered on February 8, 1973.

We proceed to determine the issue, in each case, as a final appealable order. No question as to the right of appeal is raised, or that the offense herein is *malum prohibitum* and not *malum in se*. A violation of rights guaranteed by the Constitution is properly raised in this manner by motion. *People v. Utica Daw's Drug Co.*, 16 App. Div. 2d 12, 225 N. Y. S. 2d 128.

In case No. 7166, the defendant (appellant), John M. Steurer, on February 8, 1973, pleaded guilty to the offense of "sale of security without a license." He had previously pleaded not guilty and, upon trial to a jury, was found guilty, of five counts of "sale of security without a license," and guilty of five counts of "sale of unregistered security." Thereafter, the jury verdict was set aside, and a guilty plea was entered to five counts of "sale of security without a license," and the five counts of "sale of unregistered security" were nolled.

A presentence investigation was made, and testimony of Dennis Shaul, director of commerce of the state of Ohio, was taken.

Although the penalty may be incarceration in the Ohio State Penitentiary, the trial judge ordered that Steurer, and the other defendants (appellants) be placed on probation. The trial judge also made a recommendation to the Governor of Ohio that Steurer, and the other defendants be granted clemency.

A notice of appeal was duly filed by John M. Steurer. Three other individuals, who had also pleaded guilty at

the same time to similar offenses, also filed notices of appeal. These defendants are Edward F. Barr (case No. 71-67), W. C. Emery, a. k. a. Wilbur C. Emery (case No. 71-68); and George George (case No. 7169). In each instance, the judgment entry lists the offense as "sale of security without a license."

Identical transcripts of proceedings, and briefs, have been filed in each of the four cases before us, and such cases were argued and presented to us jointly. We, therefore, present only one opinion covering the questions raised.

Each of the instant cases arose from a scheme concocted by an Akron lawyer, D. Don Lowers, who was later incarcerated in a federal prison. Lowers claimed that he purchased unclaimed goods of various kinds from freight haulers and sold this merchandise at a great profit. Many persons in the Akron area loaned him money, which, until the scheme collapsed, he would repay with high interest for the short term loans. He gave notes bearing a lawful rate of interest but the repayment would, many times, amount to from 15% to 30% interest. He was able to do this by borrowing from one lender to pay previous lenders. These defendants and other persons, numbering fifty to sixty-five, assisted in the scheme by selling notes, signed by Lowers, to various people in Summit County. In the nine years (1963 to 1972), that Lowers conducted his fraudulent enterprise, 1100 to 1500 people loaned him $11,000,-000 or more, in order to receive the exorbitant interest he promised.

Only fourteen persons, of the many who were engaged in selling Lowers' notes, were indicted for a violation of R. C. 1707.44. It is clear that these people did not know of the nefarious scheme Lowers was fostering.

Counsel, prior to trial, and prior to the plea of guilty, raised the question of a denial of the equal protection of the law as guaranteed by the Fourteenth Amendment to the Constitution of the United States, and Article I, Section 2 of the Constitution of the state of Ohio. The trial court overruled all motions directed to this subject.

It is because of this selection of only a few, of the many alleged violators in the Lowers' scheme, to be indicted and prosecuted, that these defendants claim error prejudicial to their substantial rights. They claim that:

> "1. [The trial court erred in failing to rule that] a criminal law which in practice is not equally applied and enforced by reason of the conscious failure and refusal of law enforcement officers and the grand jury to indict some persons while indicting others on the basis of an arbitrary, capricious, and unjustifiable classification may not be enforced in such cases by reason of the guarantees of Article I, Section 2 of the Ohio Bill of Rights, Article I. Section 26 of the Ohio Constitution, and the 14th Amendment to the United States Constitution.
>
> "2. The trial court erred in failing to rule that a criminal law which purports to invest discretion in law enforcement officers not to present evidence of criminality to a grand jury is violative of Article I, Section 2 of the Ohio Bill of Rights, Article II, Section 26 of the Ohio Constitution, and the 14th Amendment to the United States Constitution.
>
> "3. The trial court erred in failing to dismiss the indictment when it appeared that the prosecutor or any other unauthorized persons attended grand jury proceedings and remained in the room with jurors

while jurors were expressing their views or giving votes on matters before them.

"4. The trial court erred in failing to require the state to rebut the prima facie evidence of defendant as to the unconstitutionality of the indictment in this case."

R. C. Chapter 1707 covers the subject of securities, their sale, regulation, and registration for sale in this state. R. C. 1707.23 defines the enforcement powers of the division of securities. This section, in part, provides:

"Whenever it appears to the division of securities, from its files, upon complaint, or otherwise, that any person has engaged in, is engaged in, or is about to engage in any practice declared to be illegal or prohibited by sections 1707.01 to 1707.45, inclusive, of the Revised Code, or defined as fraudulent in such sections, or any other deceptive scheme or practice in connection with the sale of securities, or when the division believes it to be in the best interests of the public and necessary for the protection of investors, the division may:

"* * *

"(E) Initiate criminal proceedings under section 1707.44 of the Revised Code by laying before the prosecuting attorney of the proper county any evidence of criminality which shall come to its knowledge; and in the event of the neglect or refusal of the prosecuting attorney to prosecute such violations, the division shall submit such evidence to the attorney general, who may proceed in the prosecution with all the rights, privileges, and powers conferred by law on prosecuting attorneys, including the power to appear before grand

juries and to interrogate witnesses before such grand juries * * *."

There are six other provisions, in R. C. 1707.23 for the enforcement of the claim of illegal activities on the part of those against whom a complaint is made. The securities division, by this statute, has broad power to initiate, or not to initiate criminal proceedings. In the four instant cases (as well as in ten other cases), the securities division, after the matter was brought to their attention, divided the violations into three categories.

Lowers, who was the perpetrator of the scheme, was placed in category number one. As to the second category, Mr. Shaul, the director of commerce (under whose direction the division of securities operates), said:

> "* * * There was a second class of people, how broad the dimensions were to be, is a discretionary judgment made by the Prosecutor and the Grand Jury in this instance. That class of people are those who had in some instances operated as though they were engaged in a business of being lenders to the operation or had engaged to the extent that they differentiated themselves at least from the third class of people, those who were involved in the scheme and who may have been involved in a felony violation technically, but who had not conducted or as a business been engaged in the activity in the same manner that class two or Lowers himself had been."

The third group were neither prosecuted nor recommended for prosecution. There were some statements by counsel, and Mr. Shaul, that other similar offenses (unrelated to these cases), arising in this community, were not recommended for prosecution, based largely on the broad

discretionary terms of R. C. 1707.23 and the equal discretion lodged in the division of securities as to whom to recommend for prosecution of a violation. Thus, out of 65 violators of the law, in the Lowers matter, as stated by the principal investigator of the division of securities assigned to this case, a few were selected to be indicted. As indicated in the transcript of proceedings, only those with ten or more sales were brought to court. Those with nine or less apparently escaped the fate of these defendants.

The assignments of error are of such a nature that the first two may be discussed together with assignment of error number four. Assignment of error number three has been investigated, and we find no proper evidence submitted in these cases that shows the claim made in such assignment. We reject assignment of error number three.

We direct our attention to the question, under the above undisputed or uncontroverted facts, whether there was a constitutionally impermissible enforcement of the law. In other words, does the fundamental law of this state, and nation, as interpreted by the courts, permit any administrative agency or government to select, as between probable violators of the same offense, those whom it chooses to punish, and those whom it chooses not to punish. Does this intentional discrimination, as to the ones to prosecute, result in an invalid prosecution, or must all of them be prosecuted, regardless of the degree of their activity?

The justification for the selection of fourteen out of sixty-five or more probable violators is, according to the plaintiff, that the fourteen were in the "business" of selling securities, although the section of R. C. 1707.44 that provides for the crime makes no such distinction. The

fourteen violators sold more "Lowers notes" than some other violators. It is probably true that these defendants had greater opportunity to participate in selling the promissory notes, but Mr. Horden testified that all sixty-five were engaged in the same acts. There is a statement by the prosecutor that perhaps a hundred or more were, in some measure, engaged in this process.

We do not deem it necessary to set out verbatim herein Article I, Section 2 of the Ohio Bill of Rights; Article II, Section 26 of the Constitution of Ohio; and the Fourteenth Amendment to the Constitution of the United States. It is the above portions of our fundamental law that are the basis for the claim that there has been a constitutionally impermissible prosecution of the defendants. The above sections relate to the requirement that all laws have a uniform application, and no person in this country shall be denied the equal protection of its laws.

To indicate the effectiveness of these constitutional provisions, we have been cited numerous cases. In the leading case of *Yick Wo v. Hopkins* (1888), 118 U. S. 356, 373, 30 L. ed 220, 227, the court said:

> "Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution."

In *United States v. Falk*, No. 71-1213. C. R. 515, 7th Circuit U. S. Court of Appeals, January 1973 Session, the court said:

> "The promise of equal protection of the laws is not limited to the enactment of fair and impartial legislation, but necessarily extends to the application of these laws."

The Supreme Court of Ohio, in *Ohio ex rel. v. Ferris*, 53 Ohio St. 314 (paragraph four of the syllabus), said:

> "The first section of the fourteenth amendment to the constitution of the United States, which provides that no state shall 'deny to any person within its jurisdiction the equal protection of the laws,' is not as to the question in this case, broader than the second section of our bill of rights."

The essential elements necessary to make a general law operate uniformly has been well stated in *State, ex rel. English, v. Industrial Commission*, 160 Ohio St. 443 at 448, 449. We believe that these elements are properly applied to both civil and criminal statutes. Constitutional guarantees apply to the unequal enforcement of valid laws as well as to the enforcement of valid laws. See *East Coast Lumber Terminal v. Town of Babylon* (C. C. A. 2), 174 F. 2d 106 at 112, 8 A. L. R. 2d 1219.

Although the rule established by *Yick Wo v. Hopkins, supra*, has remained an accepted pronouncement of the law, that case applied to the acts of a board of supervision (a legislative and administrative agency), and not to the acts of a law enforcement agency. The rule still remains unclear as to the applicability of *Yick Wo* to discriminatory penal enforcement.

Does the equal protection clause guarantee to those who violate the law equal protection from prosecution? There are cases which hold that a failure to prosecute other violators does not bar a conviction of one who is prosecuted. The cases seem to hold that something more

than a failure to prosecute is necessary before there can be a declaration of a void conviction.

In *Oyler v. Boles,* 368 U. S. 448 at 456, the court said: "* * * the conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation." This was later followed in *Newman v. United States* (D. C. Cir.), 382 F. 2d 479. See, also: *United States v. Crowthers* (C. C. A. 4), 456 F. 2d 1074 and *Washington v. United States* (D. C. Cir.), 401 F. 2d 915. In *United States v. Steele* (C. C. A. 9), 461 F. 2d 1148, the above rule was followed, but the court discharged Steele on the basis that his evidence established that the authorities purposely discriminated against him. Prosecutorial discretion does not excuse the government; there must be something more to prevent a reversal of conviction. That "something more" is a rational basis for the selection of the person to prosecute. The Constitution condemns unreasonable discrimination by state action. *Brown v. Board of Education,* 347 U. S. 483 (the famous school case, which was not a criminal matter).

Many of the reported cases, where constitutional claims such as we have herein have arisen, have been concerned with discrimination in the enforcement of Sunday closing laws. In *Moss v. Hornig* (C. C. A. 2), 314 F. 2d 89, a shoe store proprietor sought to enjoin the enforcement of a Sunday closing law upon a showing that only two persons in one district of the state had been prosecuted as against the many who were open for business. The court, at page 92, said:

> "Mere failure to prosecute other offenders is no basis for a finding of denial of equal protection. * * * To show that unequal administration of a state statute offends the equal protection clause one must show an intentional or purposeful discrimination."

This is the rule set out in *Snowden v. Hughes*, 321 U. S. 1 at 8.

Ohio seems to support the rule above stated. *South Euclid v. Bondy*, 28 Ohio Op. 2d 316; and *State v. Haase*, 97 Ohio App. 377.

The rule which the cases uphold in discriminatory enforcement claims demands that intentional or systematic discrimination is necessary before one may be discharged on the basis of a violation of the equal protection clause. This rule has generally been applied in administrative or legislative matters. *Sunday Lake Iron Co. v. Township of Wakefield*, 247 U. S. 350, 62 L. ed 1154; *Snowden v. Hughes, supra; Brown v. Board of Education, supra.* There are few cases of penal application and those are chiefly (as we said above), due to a failure to enforce Sunday closing laws. *Taylor v. Pine Bluff*, 226 Ark. 309, 289 S. W. 2d 679.

There seems to be no great overriding reason why discriminatory enforcement claims should not apply to penal cases, as well as to administrative and legislative matters. Some cases uphold the right of intentional selection, and the right of the prosecuting officials to exercise a discretion in the matter of whom to prosecute, so long as there is no unjustifiable standard adopted, such as race, religion or other arbitrary classification.

We have been cited, and we have read, with interest, the following articles: *The Right to Nondiscriminatory Enforcement of State Penal Laws*, 61 Colum. L. R. 1103 (1961); and *Discriminatory Law Enforcement and Equal Protection From The Law*, 59 Yale L. J. 354 (1950).

In 4 ALR 3d 404, et seq., there is an annotation on the subject herein in which the rules established by the

cases (some of which we have cited above) are stated to be, at page 410 [c], as follows:

> "* * * it is insufficient merely to show that other offenders have not been prosecuted; or that there has been laxity of enforcement, or that there has been [as herein] a conscious exercise of selectivity in enforcement, but there must be sufficient evidence presented to establish the existence of intentional or purposeful discrimination which is deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification."

In the instant case, we do not find a sufficient deviation from the rule set out to justify this court in determining that the exercise of selectivity as to the defendants, which was engaged in by the division of securities, the grand jury, or the prosecuting attorney of Summit County, is constitutionally impermissible.

The judgment overruling the motion to quash the prosecution is affirmed, in each case.

We have examined all claims of error and, for the reasons above stated, we find none prejudicial to the substantial rights of the appellants herein. The orders of the trial court, and the judgments, from which these appeals were taken, are affirmed.

Judgments affirmed.

BRENNEMAN, P.J., and VICTOR, J., concur.

HUNSICKER, J., retired and assigned to active duty under authority of Section 6 (C), Article IV, Constitution.

ORDERS OF THE SUPREME COURT OF OHIO IN BARR CASE

(Filed December 7, 1973)

No. 73-837

THE SUPREME COURT OF OHIO
THE STATE OF OHIO, CITY OF COLUMBUS

STATE OF OHIO,
Appellee,

vs.

JOHN M. STEURER *et al.*,
Appellants.

APPEAL FROM THE COURT OF APPEALS
FOR SUMMIT COUNTY

This cause, here on appeal as of right from the Court of Appeals for Summit County, was heard in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

It is further ordered that a copy of this entry be certified to the Clerk of the Court of Appeals for Summit County for entry.

MOTION FOR LEAVE TO APPEAL FROM THE COURT OF APPEALS FOR SUMMIT COUNTY

It is ordered by the Court that this motion is overruled.

FINDINGS OF THE COURT OF COMMON PLEAS IN ABDULLA CASE

Case No. 72-6-634

IN THE COURT OF COMMON PLEAS
SUMMIT COUNTY, OHIO

STATE OF OHIO,
Plaintiff,

vs.

EDWARD ABDULLA,
Defendant.

FINDING [No. 1]

SANDERS, *J.*: (By Assignment)

The first motion presented to the Court reads as follows: Now comes the defendant through counsel and moves the Court for an order dismissing the indictment on the grounds that Ohio Revised Code Chapter 1707 is arbitrary, capricious and unreasonable.

Defendant maintains that Section 1707.23, entitled Enforcement Powers of the Division of Securities is an unlawful delegation of power to the Director of the Division of Securities. Defendant's contention is that administrative agencies charged with enforcing penal laws should not possess the power to make reasonable classifications of a legislative nature.

That broad policy judgments have been made by the state administrative agency in the case at Bar is clear from the testimony in the record. Mr. Shaul, Director, Division of Securities, refers to the awesome burden of reach-

ing a decision in connection with distinctions between those who violated the statute. Such a power would seem to exceed the proper scope of administrative functions in connection with penal enforcement.

Penal enforcement officers have no power to select and classify but are directed to enforce the penal laws against all violators. However, the enforcement alternatives available to the Division of Securities amounts to the power to select and classify among violators. Mr. Shaul refers to this problem in "allowing distinction as between those who violated the statute."

Legislative and administrative functions differ in their scope of permissible classification. State agents, charged with enforcement of a legislative mandate, don't have the same authority to classify, because it is not their function to make the broad policy judgments that may require such classification.

The use of enforcement alternatives under 1707.23 of the Ohio Revised Code gives the Division of Securities almost unlimited latitude in the administration of the Act. In practice, this latitude has resulted in an unconstitutional application of legislative power in opposition to Article 2, Section 26 of the Constitution of the State of Ohio.

Article 2, Section 26 of the Constitution of the State of Ohio requires that "All laws, of a general nature, shall have a uniform operation throughout the state; nor shall any act, except such as relates to public schools, be passed, to take effect upon the approval of any other authority than the General Assembly, except as otherwise provided in this Constitution."

What this means is that State action must be even handed in every respect. If no real differences exist be-

tween persons, the State, acting through an administrative agency, cannot make one. The social interest in protecting individual rights, and particularly in securing equal justice, out-weighs social interest in punishing criminals.

Consistent with Article 2, Section 26 of the Constitution of the State of Ohio the legislature should have established specific enforcement guidelines with respect to criminal prosecutions of security violations.

In *U.S. v. Crowthers*, 456 Federal R 2d page 1080, the Court speaks as follows:

> "It is clearly unconstitutional to enable a public official to determine which expressions of view will be permitted and which will not, or to engage in invidious discrimination among persons or groups whether by use of a statute providing a system of broad discretionary licensing power, or as in this case, the equivalent of such a system by selective enforcement of an extremely broad prohibitory statute."

It is the opinion of this Court that the Ohio Revised Code Chapter 1707 is arbitrary, capricious and unreasonable.

The first motion of the defendant is sustained and the Court dismisses and quashes the indictment.

FINDING [No. 2]

SANDERS, J.: (By Assignment)

The Second Motion presented to the Court by the defendant reads as follows:

Now comes the defendant through counsel and; moves that the indictment herein be dismissed for the reason

that Chapter 1707 of the Ohio Revised Code entitled "Securities" has and is being used by the Prosecutor of this County in an arbitrary, unreasonable and unlawful manner in that there has been selective prosecution thereunder, so as not to apply the same in a uniform manner throughout the County and State of Ohio, all being contrary to Article 2, Section 26 of the Ohio Constitution and in violation of the Equal Protection clause as set forth in the Fourteenth Amendment of the Federal Constitution.

This Motion was properly presented to the Court for a motion to dismiss or quash and was not presented as a defense in the defendant's case.

By agreement of counsel for the State of Ohio and for the defendant it was agreed that the Court could read and consider the sworn testimony of Thomas E. Horden, an investigator for the Department of Commerce, Division of Security for the State of Ohio in a matter tried before the Honorable Thomas Stahl on September 25, 1972.

The following questions and answers are contained in the record beginning on page 18 thereof:

Q. Well, it was a very general question. I would like you to answer it completely. Did that investigation reveal anything else to you?

A. Yes.

Q. All right. Tell the ladies and gentlemen of the jury what it revealed.

A. Well, it revealed that many of the transactions that were entered into and the various dispositions of securities was entered into, was participated by as many as approximately 65 various people.

Q. All right. When you say 65 various people, what did your investigation reveal that these 65 people were doing?

A. Well, they were disposing or assisting Mr. Lowers in placing these various securities.

Q. Other people that were doing the same thing that Jack Steurer is charged with doing?

A. That is correct.

Q. There were some 65 of them?

A. That is correct.

According to the sworn statement of this representative of the Security Department at least 65 people were assisting Lowers in the so-called "Sale of Securities". As a result of the action by the Security Department and the Grand Jury and Prosecuting Attorney of Summit County, Ohio 14 of these individuals were selected and indicted. The fifty or more remaining individuals were not indicted.

The Court finds that the acts of the Security Department, Prosecutor and the Grand Jury of Summit County, Ohio constituted a conscious intentional discrimination in violation of the Equal Protection guaranteed by Article 2, Section 26 of the Ohio Constitution and in violation of the Equal Protection clause as set forth in the 14th Amendment of the Federal Constitution.

Reference is made to the case of *People of the State of New York v. Utica Daw's Drug Company, Inc.*, New York Supreme Court, Appellate Division, 16 App. Div. 2d 12. Also *South Euclid v. Bondy*, 28 O. Ops. 2d, 316.

In recent years, there has been an increasing tendency for the United States Supreme Court to assure a defendant in a criminal case that he cannot constitutionally be convicted if law enforcement officers dealt unfairly with him at any stage before or after the commencement of the proceeding. In line with this tendency this Court holds

that the defendant cannot constitutionally be convicted if he has been the victim of discriminatory enforcement of the law. That is, if law enforcement officers have been guilty of unfair conduct by discriminatorily singling out the defendant for prosecution without prosecuting others for similar violations.

The motion of the defendant to dismiss the indictment or quash same sustained.

DECISION AND JOURNAL ENTRY OF COURT OF APPEALS IN ABDULLA CASE

C.A. No. 7187.

IN THE COURT OF APPEALS,
NINTH JUDICIAL DISTRICT.
STATE OF OHIO, SUMMIT COUNTY, SS:

STATE OF OHIO,
Plaintiff-Appellant,

vs.

EDWARD ABDULLA,
Defendant-Appellee.

DECISION AND JOURNAL ENTRY

Dated August 1, 1973.

This matter came on to be heard the 26th day of June, 1973, upon the record in the trial court, including the Transcript of Proceedings; and briefs. It was argued by counsel for the parties, and submitted to the court.

Each assignment of error was reviewed and, upon review, the following disposition made:

HUNSICKER, *J.*

An appeal has been lodged in this court by the state of Ohio, from a judgment entered in the Court of Common Pleas of Summit County, rendered by a visiting Judge of such court, sitting by special assignment.

The defendant (appellee), Edward Abdulla, was indicted on June 28, 1972, and charged with four counts of "sale of security without a license," and four counts of "sale of unregistered security." These offenses are a part of Chapter 1707, Ohio Revised Code.

After various preliminary activities by Abdulla, he filed eight motions directed to the indictment and other matters preliminary to trial. Two of the motions were sustained, and the others resulted in action favorable to the state of Ohio.

The state of Ohio filed a notice of appeal, after leave to appeal was granted by this court.

The judgment to which the Prosecuting Attorney takes exception, and which is the basis of the appeal to this court, is, in its pertinent part, as follows:

> "(1) Motion No. 1 is granted, and the court dismisses the indictment for the reasons that the Ohio Revised Code, Section [sic] 1707 is arbitrary and unreasonable.
>
> "(2) The court dismisses the indictment on Motion No. 2, for the reason that it is in violation of the equal protection clause, as set forth in the Federal Constitution, and in Article No. 2, Section 26 of the Ohio Constitution."

The state of Ohio says that:

> "I. It was error to quash the indictment and to find Ohio Revised Code Chapter 1707 unconstitutional because it is arbitrary, capricious, and unreasonable.
>
> "II. It was error to quash the indictment and to find that there had been selective enforcement under Ohio Revised Code Chapter 1707 that amounted to an equal protection violation in this case.
>
> "III. It was error to allow the defendant, Edward Abdulla, to change his plea from guilty to no [sic] guilty."

This case, as well as thirteen other similar cases, arose out of a scheme concocted by an Akron lawyer, D. Don Lowers, who was later incarcerated in a Federal prison. Lowers claimed that he purchased unclaimed goods of various kinds from freight haulers and sold this merchandise at a great profit. Many persons in the Akron area loaned him money which, until the scheme collapsed, he would repay with high interest for short term loans. He gave notes bearing a lawful rate of interest, but the repayment would, many times, amount to from 15% to 30% interest. He was able to do this by borrowing from one lender to pay previous lenders. Edward Abdulla, and other persons, numbering 50 to 65, assisted in the scheme by selling notes, signed by Lowers, to various people in Summit County. During the nine years (1963 to 1972), that Lowers conducted his fraudulent enterprise, 1100 to 1500 people loaned him $11,000,000.00, or more, in order to get the exorbitant interest he promised.

Of the many who engaged in selling Lowers' notes, only 14 persons were indicted for a violation of Section 1707.44, Ohio Revised Code. It is clear that these people

did not know of the nefarious scheme Lowers was fostering.

We do not find prejudicial error in the trial court permitting Abdulla to change his plea before a trial was begun. Section 2943.03, Revised Code. We reject assignment of error number III.

We shall discuss assignments of error numbers I and II jointly, because of their interrelation. We adopt herein the memorandum opinion issued this day in the case of *State v. Steurer*, No. 7166, and in cases numbers 7167, 7168, and 7169, bearing on this case, since all such cases have arisen out of the Lowers fiasco. That memorandum covers the matter of selective and discriminatory enforcement, which we do not find constitutionally impermissible herein.

Motion No. 1, which was made by defendant and sustained by the trial court, referred to Chapter 1707, Ohio Revised Code, and not to "Ohio Revised Code, Section 1707," as stated in the journal entry. The journal entry referred to above, which was approved by counsel for all parties, and the trial Judge, is obviously in error and should be amended to speak the truth, since all briefs argue the point in issue. Is Chapter 1707, Ohio Revised Code, arbitrary and unreasonable and, thus, unconstitutional?

Motion No. 2 then raises the question of discriminatory enforcement of the penal sections of Chapter 1707, Ohio Revised Code. Is there, in this case, a constitutionally impermissible discrimination in the enforcement of Chapter 1707, Ohio Revised Code. The Steurer opinion, which we adopt herein, says that there was no impermissible discrimination in the selection of the 14 violators.

Chapter 1707, Ohio Revised Code, covers the subject of securities, their sale, regulation, and registration for sale in this state. Section 1707.23, Revised Code, defines the enforcement powers of the division of securities. This section, in part, provides:

> "Whenever it appears to the division of securities, from its files, upon complaint, or otherwise, that any person has engaged in, is engaged in, or is about to engage in any practice declared to be illegal or prohibited by sections 1707.01 to 1707.45, inclusive, of the Revised Code, or defined as fraudulent in such sections, or any other deceptive scheme or practice in connection with the sale of securities, or when the division believes it to be in the best interests of the public and necessary for the protection of investors, the division may:
>
> "* * *
>
> "(E) Initiate criminal proceedings under section 1707.44 of the Revised Code by laying before the prosecuting attorney of the proper county any evidence of criminality which shall come to its knowledge; and in the event of the neglect or refusal of the prosecuting attorney to prosecute such violations, the division shall submit such evidence to the attorney general, who may proceed in the prosecution with all the rights, privileges, and powers conferred by law on prosecuting attorneys, including the power to appear before grand juries and to interrogate witnesses before such grand juries; * * *."

There are six other provisions in Section 1707.23, Revised Code, for enforcement of claimed illegal or irregular activities on the part of those against whom complaint is

made. The division of securities, by this statute, has broad power to initiate criminal proceedings.

The division of securities of Ohio, after complaint and investigation, divided the violators into three categories. Lowers, who was the perpetrator of the scheme, was placed in category number one. As to the second category, the Director of Commerce (under whose direction the division of securities operates), Mr. Shaul, said:

> "* * * There was a second class of people, how broad the dimensions were to be, is a discretionary judgment made by the Prosecutor and the Grand Jury in this instance. That class of people are those who had in some instances operated as though they were engaged in a business of being lenders to the operation or had engaged to the extent that they differentiated themselves at least from the third class of people, those who were involved in the scheme and who may have been involved in a felony violation technically, but who had not conducted or as a business been engaged in the activity in the same manner that class two or Lowers himself had been."

The persons in the third group were never prosecuted nor recommended for prosecution. There were some statements by counsel, and Mr. Shaul, that other similar offenses (unrelated to these cases), arising in this community, were not recommended for prosecution, based largely on the broad discretionary terms of Section 1707.23, Revised Code, and the equal discretion lodged in the division of securities as to whom to recommend for prosecution of a violation. Thus, out of 65 violators of the law in the Lowers matter, as stated by the principal investigator of the Division of Securities assigned to this case, a few were selected to be indicted. As indicated in the transcript of proceedings, only those persons with ten or more sales

were brought to court. Those with nine sales, or less, apparently escaped the fate of these defendants (appellants).

Mr. Horden, the investigator for the Division of Securities assigned to this case, whose testimony taken in the cases of *Steurer*, and others, was before the trial court herein by agreement of counsel, testified as to the number of people who were involved in disposing of the Lowers' notes to others. Mr. Horden said, in part:

"Q. Now, what else did that investigation reveal, sir?

"A. [Thomas E. Horden]. In what area?

"Q. Well, it was a very general question. I would like you to answer it completely. Did that investigation reveal anything else to you?

"A. Yes.

"Q. All right. Tell the ladies and gentlemen of the jury what it revealed.

"A. Well, it revealed that many of the transactions that were entered into and the various dispositions of securities was entered into, was participated by as many as approximately 65 various people.

"Q. All right. When you say 65 various people, what did your investigation reveal that these 65 people were doing?

"A. Well, they were disposing or assisting Mr. Lowers in placing these various securities.

"Q. Other people that were doing the same thing that Jack Steurer is charged with doing?

"A. That is correct.

"Q. There were some 65 of them?

"A. That is correct."

The justification for the selection of 14, out of 65 or more probable violators, is, according to the plaintiff (appellant), that the 14 were in the "business" of selling securities, although the section of the Revised Code that provides for the crime, Section 1707.44, makes no such distinction. The 14 violators sold more Lowers' notes than some other violators.

We do not deem it necessary to set out verbatim herein Section 2 of Article I of the Ohio Bill of Rights; Section 26 of Article II of the Constitution of Ohio; and the Fourteenth Amendment to the Constitution of the United States. It is the above portions of our fundamental law that are the basis for the claim that there has been herein a constitutionally impermissible prosecution of the defendant (appellee). The above sections relate to the requirement that all laws have a uniform application, and no person in this country shall be denied the equal protection of its laws.

The state of Ohio, as appellant herein, insists that the trial Judge was in error when he quashed the indictment against Edward Abdulla "for the reasons that the Ohio Revised Code, Section [sic] 1707 is arbitrary and unreasonable."

The parties, in their briefs, argue the question of an unlawful delegation of legislative power granted by Section 1707.23, Revised Code.

As early as 1916, in *Hall v. Geiger-Jones Co.*, 242 U.S. 539; 61 L. ed 480, the court determined that dealers in corporate securities cannot successfully urge against the validity of the then existent securities law of Ohio making a license a condition precedent to dealing in corporate securities.

The specific section under attack herein provides for the manner by which the law pertaining to the sale of securities may be enforced. This is a proper subject for legislative delegation of administrative functions. Modern government could not operate without the power of the legislature to delegate administrative duties. The many boards and commissions for state and national governments to carry on their work have given rise to a new body of law, which, in the early days of the nation, was neither needed nor desired.

In *Matz v. Curtis Cartage Co.*, 132 Ohio St. 271, at 279, the court said:

> "It is an accepted doctrine in our constitutional law that the law-making prerogative is a sovereign power conferred by the people upon the legislative branch of the government, in a state or the nation, and cannot be delegated to other officers, board or commission, or branch of government. Thus neither the Congress of the United States nor the General Assembly of Ohio can delegate its legislative power, but may confer administrative power on an executive, a board or commission."

It was further determined by the court in that case (seventh paragraph of the syllabus), that:

> "As a general rule a law which confers discretion on an executive officer or board without establishing any standards for guidance is a delegation of legislative power and unconstitutional; but when the discretion to be exercised relates to a police regulation for the protection of the public morals, health, safety or general welfare, and it is impossible or impracticable to provide such standards, and to do so would defeat the legislative object sought to be accomplished, legis-

lation conferring such discretion may be valid and constitutional without such restrictions and limitations."

Delegation of power to an administrative board has been approved in *State v. Switzer,* 22 Ohio St. 2d 47; *State v. Schreckengost,* 30 Ohio St. 2d 30; *American Woodware Mfg. Co. v. Schorling,* 96 Ohio St. 305; and *Yee Bow v. Cleveland,* 99 Ohio St. 269.

In the delegation of power to an administrative agency, the test should be: does such delegation relate to execution?

Thus, in *State, ex rel. v. Matia,* 138 Ohio St. 504, at 507, the court said that: "* * * while the Legislature may not delegate its power to make a law, it may make a law to become operative on the happenings of a certain contingency, or a future specified event."

In a very early case, Chief Justice John Marshall said, in *Wayman v. Southard,* 10 Wheaton 1, 6 L. ed. 253, at 263:

> "It will not be contended that Congress can delegate to the courts, or to any other tribunals, powers which are strictly and exclusively legislative. But Congress may certainly delegate to others, powers which the legislature may rightfully exercise itself."

This rule is found in the well stated language of *Cincinnati, Wilmington and Zanesville R. R. Co. v. Commissioners,* 1 Ohio St. 77, at 82-83 (a landmark case on the power of the legislature to delegate functions of government).

> "But while the right and duty of interference in a proper case, are thus undeniably clear, the principles by which a court should be guided, in such an inquiry,

are equally clear, both upon principle and authority. It is never to be forgotten, that the presumption is always in favor of the validity of the law; and it is only when manifest assumption of authority, and clear incompatability between the constitution and the law appear, that the judicial power can refuse to execute it. Such interference can never be permitted in a doubtful case. And this results from the very nature of the question, involved in the inquiry.

"The Legislature is, of necessity, in the first instance, to be the judge of its own constitutional powers. Its members act under an oath to support the constitution, and in every way, under responsibilities as great as judicial officers. Their manifest duty is, never to exercise a power of doubtful constitutionality. Doubt, in their case, as in that of the courts, should be conclusive against all affirmative action. This being their duty, we are bound, in all cases, to presume they have regarded it; and that they are clearly convinced of their power to pass a law before they put it in the statute book. If a court, in such case, were to annul the law, while entertaining doubts upon the subject, it would present the absurdity of one department of the government overturning, in doubt, what another had established, in settled conviction; and to make the dubious constructions of the judiciary, outweigh the fixed conclusions of the General Assembly.
* * *

"The true distinction, therefore, is, between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring an authority or discretion as to its execution, to be exercised under and in pursuance of the law.

The first cannot be done; to the latter no valid objection can be made."

Of course, standards for guidance of the executive or administrative body must be given in the legislative enactment. We believe that Section 1707.23, Revised Code, does fix guidelines and rules to follow in the enforcement of the securities law. This law is not a prohibition against the sale of securities, but it is a regulation of their sale for the protection of the buyer of securities. It seeks to prevent fraud in the disposition of securities, and, to that end, the Legislature established broad powers of administration. There can be no question that laws to prevent fraud in the sale of securities are necessary for the public and are a valid exercise of the police power.

The securities law, Chapter 1707, Revised Code, and particularly Section 1707.23, Revised Code, is not an arbitrary, capricious or unreasonable law.

We have examined the errors assigned herein and determine that the trial court committed error prejudicial to the rights of the state of Ohio as to assignments of error I and II, and the judgments on such assignments are reversed.

As to assignment of error III, we find no error of a prejudicial nature.

The judgment dismissing the indictment is reversed, and the case is remanded to the trial court for further proceedings.

The court finds that there were reasonable grounds for this appeal.

A certified copy of this entry shall constitute the mandate, pursuant to Rule 27 of the Rules of Appellate Procedure.

Ten (10) days from the date hereof, this document shall constitute the journal entry of judgment, and it shall be file-stamped by the Clerk of the Court of Appeals, at which time the period for review shall begin to run. Appellate Rule 22(E).

Exceptions.

/s/ MYRON T. BRENNEMAN
Presiding Judge—for the Court

BRENNEMAN, *P.J.*, and VICTOR, *J.*, concur

(HUNSICKER, *J.*, retired and assigned to active duty under the provisions of Section 6.(C), Article IV, Constitution.)

ORDERS OF THE SUPREME COURT OF OHIO IN ABDULLA CASE

(Filed November 29, 1973)

No. 73-815

THE SUPREME COURT OF OHIO
THE STATE OF OHIO, CITY OF COLUMBUS

STATE OF OHIO,
Appellee,

vs.

EDWARD ABDULLA,
Appellant.

APPEAL FROM THE COURT OF APPEALS FOR SUMMIT COUNTY

This cause, here on appeal from the Court of Appeals for Summit County, was heard in the manner prescribed by law, and, no motion to dimiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

It is further ordered that a copy of this entry be certified to the Clerk of the Court of Appeals for Summit County for entry.

MOTION FOR LEAVE TO APPEAL FROM THE COURT OF APPEALS FOR SUMMIT COUNTY

It is ordered by the Court that this motion is overruled.